No. 5131

# United States Circuit Court of Appeals

## For The Ninth Circuit

CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, and ROMEO TRONCA,

*Plaintiffs-in-Error,*

—VS.—

UNITED STATES OF AMERICA,

*Defendant-in-Error.*

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF PLAINTIFFS-IN-ERROR


JOHN F. DORE,
F. C. REAGAN,
H. S. FRYE,
Seattle, Washington,
*Attorneys for Plaintiffs-in-Error.*



THE ARGUS PRESS · SEATTLE



FILED
OCT 21 1927
F. D. MONCKTON,
CLERK

No. 5131

# United States Circuit Court of Appeals

## For The Ninth Circuit

CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, and ROMEO TRONCA,

*Plaintiffs-in-Error,*

—VS.—

UNITED STATES OF AMERICA,

*Defendant-in-Error.*

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

# BRIEF OF PLAINTIFFS-IN-ERROR

JOHN F. DORE,
F. C. REAGAN,
H. S. FRYE,
Seattle, Washington,
*Attorneys for Plaintiffs-in-Error.*

THE ARGUS PRESS · SEATTLE

# United States Circuit Court of Appeals
## For The Ninth Circuit

| | |
|---|---|
| CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, and ROMEO TRONCA, *Plaintiffs-in-Error,*<br>—vs.—<br>UNITED STATES OF AMERICA, *Defendant-in-Error.* | No. 5131 |

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

# BRIEF OF PLAINTIFFS-IN-ERROR

## STATEMENT OF THE CASE

The plaintiffs-in-error, Frank Gatt, John Gatt, Charles Romeo, Romeo Tronca, and August Bianchi, were convicted of conspiracy to violate the National Prohibition Act. The indictment charged:

> "That it was then and there further the plan, purpose, and object of said conspiracy, and the object of said conspirators so conspiring together as aforesaid, to knowingly, wilfully, and unlawfully conduct and maintain a common nuisance at certain premises within the city of Seattle, in the Northern Division of the Western District

of Washington, and within the jurisdiction of this court, to-wit, 404 Fifth Avenue South, Seattle, Washington, by keeping, selling and bartering therein certain intoxicating liquors, to-wit, whiskey, distilled spirits, and divers other liquors, etc." (R. 4)

There were eleven overt acts laid, ten having to do with charging the possession and sale of intoxicating liquors at 404 Fifth Avenue South, Seattle, Washington, and the maintenance of a nuisance. Overt Act 10 charged that they possessed intoxicating liquor at Room 17, 404½ Fifth Avenue South.

The testimony of the prohibition agents was that at various dates over a considerable space of time they visited the place at 404 Fifth Avenue South, known as the Monte Carlo Cafe. On February 28th, the day the arrest was made, a cache of liquor was found in Room 17, 404½ Fifth Avenue South. The testimony was that the defendants rented this room.

There was sufficient conflict in the testimony to take the case to the jury. The plaintiffs-in-error ask for a reversal upon errors of law occurring at the trial.

## ASSIGNMENTS OF ERROR

### I.

The court erred in declaring Mrs. Frank Gatt, the wife of one of the defendants, an incompetent witness, and in refusing to allow her to testify.

### II.

The court erred in admitting the testimony of the

witness Whitney as to the conversation he had with Rossi, who was not on trial and not present in court, and which was told to Whitney at the time Rossi was informing against his associates.

III.

The court erred in telling the jury that the statement made by Rossi to Whitney, outside of court, should be weighed the same as if it had been given in court by Rossi himself. And the court erred in this same regard in telling the jury to consider in any manner the testimony of Rossi (R. 28-29).

IV.

The court erred in allowing the witness Whitney to tell the jury what the notations on Exhibit 46 meant, and in admitting Exhibit 46 in evidence (R. 28-29).

V.

The court erred in not granting a new trial because of the prejudicial argument of the Government's attorneys (R. 28-29).

## ARGUMENT

### Assignment of Error I.

Mrs. Frank Gatt was produced as a witness on behalf of the defendants (R. 81), when the following occurred:

Direct Examination:

"Q. What is your name?

A. Mrs. Frank Gatt.

Q. What relation are you to the defendant Frank Gatt?

A. His wife.

Q. I will ask you, Mrs. Gatt, where you live; where the family home is?

Mr. McKinney: We object to any testimony from this woman on the ground that she is the wife of the defendant.

The Court: If an objection is made on that ground the objection is sustained.

Mr. Dore: Note an exception. Does Your Honor hold she won't be allowed to testify at all?

Mr. McKinney: Not on behalf of her husband.

The Court: You say you offer her in behalf of the other defendants?

Mr. Dore: I am offering her as a witness.

The Court: She can testify in behalf of any of the other defendants; if you offer her as a witness for any of the other defendants, except her husband, she will be permitted to testify; but she cannot testify in behalf of her husband over the objection of the Government.

Mr. Dore: Note an exception."

The court held that Mrs. Gatt, because she was the wife of the defendant Frank Gatt was an incompetent witness in behalf of her husband.

In the case of *Randleman v. United States*, 18 Fed. (2d) 27, decided by this court, the wife of a defendant is held to be a competent witness and the denial to the defendant of the right to avail himself of her testimony is sufficient grounds for reversal. The sole question for decision in that case was the refusal to allow the wife to testify in a Federal court in the State of Washington. This court held that she was a competent witness and that the case should be reversed on that ground alone. That case is decisive on the first assignment of error and must cause a reversal.

### Assignment of Error II.

Under this Assignment a number of assignments of error can be disposed of.

James Rossi was not apprehended and was not on trial. On page 76 of the Record appears the following:

> "I had a conversation with Rossi in September, 1924. This conversation took place at Sixth or Seventh Avenue and Jackson Street. He went out driving with me in my automobile. He was not under arrest, he was simply riding with me in my automobile. I met him by prearrangement, for the purpose of having a conversation with him. I talked with him in December over the telephone. He told me then over the telephone that he collected police graft and sheriff's graft. He told me that Frank Gatt was the king of the grafters and was getting rich; that he didn't like it and that

> lots of the Italians didn't like it, and for that reason he told me the story. He told me he was telling me the story because he wanted to help me catch Frank Gatt. He told me he was collecting for Gatt about $12,000 a month. He said Gatt was paying him $110 a month for this collection. He arranged to call me up on the telephone and tell me what was going on. He called me before this raid."

This was cross examination, but is set out here so as to make clear the fact that the direct testimony of William M. Whitney which was being objected to as to his relations with Rossi was incompetent and inadmissible.

> "The witness Whitney further testified that he questioned the defendant Gatt quite closely regarding the ownership and operation of the Monte Carlo because a short time previously he had talked a number of times with one of the employees of Frank Gatt, a defendant named James Rossi; that the witness talked to Rossi in December, 1924, and in January, 1925, and February, 1925, and talked to him personally on a number of other occasions during those months over the telephone; that Rossi stated that he was at all those times before the raid on the Monte Carlo and was still in the employ of and working with Frank Gatt; that he went to work first for Frank and John Gatt several months prior to November, 1923, as a bartender in the Monte Carlo at one hundred ten dollars per month; that he worked one of the shifts of eight

hours at the Monte Carlo from the time of his employment until in the early summer of 1924, after which time he became an outside man in the selling and handling of whiskey and in helping to operate some stills for the Gatts and the Monte Carlo outfit and also became a collector for the Gatts, which Rossi stated to the witness was his business at the time of these conversations. Rossi further told witness that while he was bartender John and Frank Gatt were the owners of the Monte Carlo and the principal ones connected with the Monte Carlo outfit; that in the Monte Carlo outfit were Louis Cicci, Frank Gatt, John Gatt, Charles Romeo, Romeo Tranca and August Bianchia; that until the summer of 1924, he sold whiskey over the bar; that they always had a bottleman or man in front of the bar whose business it was to carry the bottle; that Frank Gatt carried on his whiskey business out of the Monte Carlo and saw those he supplied with moonshine in the office of the Monte Carlo; that when he, Rossi, went to work he would find a certain amount of the money left in the cash-register; that he rang up the money in the cash-register for the sales of whiskey and that Frank Gatt at least once a day came and counted up the money and would take the money and that sometimes John Gatt would come and count up and take the money; that he would get his wages as long as he was at the Monte Carlo from either Frank or John Gatt and that he has seen August Bianchia also get his money from John or Frank Gatt.

Rossi stated to witness that some one came into the Monte Carlo two or three days after Rossi had sold Mr. Whitney whiskey in November, 1925, and told Frank Gatt that it was Whitney to whom he had sold whiskey a short time before, and that Gatt got scared and told Rossi to lay off a few days on the selling; that the Gatts became worried in January, 1924, over the rumor that Mr. Whitney was attempting to apprehend the Monte Carlo and on January 19, 1924, Frank Gatt made a bill of sale to Charles Romeo and Romeo Tronca; that the bill of sale stated that the price was six thousand dollars; that this was a fake bill of sale; that neither Tronca nor Romeo paid Frank Gatt anything, that they simply allowed Gatt to transfer the property to them and that at all times up into February, 1925, Frank Gatt and John Gatt were the owners of the Monte Carlo and neither Rossi, Tronca or Romeo had anything to do with the Monte Carlo as owners and that Frank Gatt continued to take the money every day after he executed the bill of sale just like he did before. That one of the reasons that Tronca and Romeo in February, 1924, executed a bill of sale of one-third interest in the Monte Carlo to Rossi was that Rossi applied for and got from the city council of Seattle a card-room and pool-table license because only citizens could get licenses and neither Tronca nor Romeo were citizens; that Rossi did not put up any money for this alleged interest; that this arrangement was gone through at the

request of Frank and John Gatt. That he, Rossi, executed a bill of sale for his interest over to Tronca and Romeo; that neither Tronca nor Romeo paid him anything for this. That Charles Romeo was the right-hand man of Frank Gatt, and they worked together in the whiskey business out of the Monte Carlo; that later Romeo Tronca made a bill of sale to Charles Romeo; that Tronca, so far as the Monte Carlo is concerned, merely held title to cover up for Frank Gatt; that later Romeo Tronca made a bill of sale to a fictitious person under the name of Tony Saraci and when Rossi talked to witness in February, 1925, they had not yet found anyone who would answer as Tony Saraci; that Rossi, Romeo, and Tronca had often talked the matter over with Frank Gatt as to the covering up of the ownership; that these fake bills of sale; that he knew Gatt paid Romeo and Tronca money but he did not know exactly how much they were getting but he did know August Bianchia was getting one hundred ten dollars per month; that room 17 at the Saint Paul Rooms, 404½ Fifth Avenue South, just over the Monte Carlo was used as a *chach* and had been used for a long time and even before he, Rossi, went to work at the Monte Carlo and that it was still being used in February, 1925, and that Rossi explained to the witness just where the secret cache was in room 17, and how to open it and get into it; that if they raided the Monte Carlo and searched the bartender they would find the key on his person which would open it and get

into it; that they sometimes carried 20 to 25 gallons of whiskey and several cases of bonded stuff in this cache. *That Rossi told the witness in February, 1925, that he would notify the witness when the cache was filled up and said that they were about to put a large quantity of liquor in the cache and he, Rossi, would phone witness when it was full* and that Rossi did a few days later 'phone him that the liquor was in the cache and he would find the key to the cache and said that Gatt often came in the evening to the office in the Monte Carlo and concluded his deals for liquor in the office. The defendant Rossi also stated to the witness that if they arrested and searched Frank Gatt, they would find in his pocket papers and documents showing the places that the Gatts were doing business with the amount they paid; that defendant Rossi further stated to witness that while he was working as bartender August Bianchia was working as morning bartender, working until about four o'clock in the afternoon, at which time Rossi went on shift; that Bianchia had a bottleman as well as he, Rossi. Rossi further stated to the witness that Frank Gatt was working in the Monte Carlo as a bartender up until the early part of 1923, after which time he did not work very much.

"The witness Whitney further stated that Rossi had told him he was just a day or two before the raid on the Monte Carlo and that he was still in the employ of Frank Gatt, getting one hundred and ten dollars per month and had informed the

> witness that Room 17 of the St. Paul Rooms, 404½ Fifth Avenue South was being fitted up and well stocked with liquors and that the witness would find the cache full as he had told witness a few days before he would let him know when it was stocked; that this cache was merely a working cache for the Monte Carlo and a few of the smaller establishments for which the Monte Carlo furnished whiskey around there and that the cache would be full by the time we could make the raid." (R. 64-69)

At this point the court was asked to instruct the jury that this testimony only goes as against the defendant Rossi and cannot be taken to establish any fact as against any other defendant. The court refused the request. And on page 70 of the Record the following occurred:

> "Mr. Rossi also stated that in 1925, a few days before the raid, he was working under the direction of the Gatts and Frank Gatt in particular and was collecting from other bootlegging establishments which Frank Gatt and John Gatt operated out of the Monte Carlo and was furnishing liquor and collecting thousands of dollars a month, as high as twelve thousand dollars a month, and turned it over to Frank Gatt as protection and graft money from these institutions and brought it up to the office and turned it over to Frank Gatt in the office of the Monte Carlo.
>
> MR. DORE: I move that testimony be stricken and the jury instructed to disregard it as incompetent, irrelevant and immaterial.

> THE COURT: With relation to the collection of the graft money, that may be stricken.
>
> MR. DORE: Note an exception."

It is apparent from the cross examination of the witness Whitney, and apparent from the testimony itself on direct examination, that Rossi at the time he had the conversation with Whitney had turned traitor to his associates. Nothing that he told Whitney by the widest scope of imagination could be considered as a statement made in furtherance of the conspiracy. As Whitney says himself, he was riding around in Whitney's automobile and laying plans to aid Whitney in the apprehension of his colleagues. The purpose of Rossi's testimony was to furnish Whitney with means to apprehend and convict his associates. Rossi wasn't on trial, the testimony was not admissible against him because he was not being tried; it was not admissible against any of the other defendants because none of them were present at the time the conversation took place, and furthermore it was not admissible under the rule of statements made during the life of the conspiracy in furtherance thereof.

But when the court came to his instruction, to which exception was taken (R. 28) he says:

> "Is any credence to be placed in the testimony of Pepe, or the statements made by Rossi to Whitney, as disclosed by Mr. Whitney. Pepe says that a conspiracy was formed. Whitney said what Rossi told him with relation to the activities of the defendant Frank Gatt. From the statements of both of these parties they were parties to the conspiracy. Pepe said what Gatt did, that he

acted under the direction and supervision of Gatt; that the holding of the bill of sale which was executed in January, 1925, was without his knowledge—he knew nothing about it—it was given to him by Frank Gatt and that Gatt told him what his name was to be henceforth; and you heard his testimony with relation to statements made to him by Frank Gatt with relation to the conduct of the parties. Now you are instructed that Pepe's testimony, likewise the statement of Mr. Rossi under the law are denominated accomplices, and the testimony of an accomplice is from a polluted source. Now the testimony of an accomplice should be received with care and caution and subjected to careful scrutiny in the light of all of the other evidence in the case; and the jury ought not to convict upon the testimony of an accomplice alone unless after a careful examination of such testimony the jurors are satisfied beyond a reasonable doubt of its truth and that they can safely rely upon it." (R. 92-3)

The jury were told in this instruction that Whitney's recital of his conversation with Rossi was the same as if Rossi were present in court and giving the testimony. And to emphasize to the jury that Whitney's statement as to what Rossi said should be treated the same as if they had heard it from the lips of Rossi himself, the court told the jury that Rossi was an accomplice. The court tells the jury that Pepe, one of the indicted persons, who under oath gave testimony against the defendants, was of the same class of witness as Rossi and that Rossi's testimony should

be weighed just the same as that of Pepe, and that they were both accomplices, and that the jury had the right—after applying the cautionary instruction as to the valuation to be given to the testimony of an accomplice—to place the same reliance upon the statements made by Rossi to Whitney as upon the sworn statements of Pepe on the witness stand. To say that Whitney's recital of what Rossi told him makes the statements as related by him the same as if they came from Rossi's lips upon the witness stand, the same as if Rossi were subjected to cross-examination, is a legal absurdity. The instruction was erroneous and prejudicial.

The instruction was erroneous on another ground, and that was because the testimony of Rossi was not admissible or competent against any of the defendants and could not be weighed for any purpose against them. But when you take this instruction and consider that it is erroneous because it gave to the statements of the absent Rossi the same standing as if he were a witness in court, coupled with the fact that it was purely inadmissible, must cause a reversal of this judgment.

In Gatt's pocket was found a piece of paper which was marked Exhibit 46 (R. 60). Over objection the following testimony was given:

> "Government's Exhibit 46 I took from his vest pocket, folded up in the way it naturally folds up.
>
> Mr. Whitney identified Government's Exhibit 46, as a paper which he took out of Frank Gatt's vest pocket, folded up naturally, and testified that

he was familiar with the premises and buildings mentioned on the exhibit as they were on February 28th, 1925.

Q. Now, Mr. Whitney, are you familiar with those premises described in that exhibit?

A. Yes, sir.

Q. Do you know what kind of premises those buildings were?

Objected to by the defendants on the ground that it is incompetent, irrelevant and immaterial. Objection overruled and an exception allowed.

A. Yes, sir.

Q. What kind were they?

Same objection by the defendants, on the same grounds.

The Silver Dollar is a soft-drink joint at 217½ Second Avenue South; 116 Third Avenue South is a soft-drink bar and bootlegging joint. 104½ Fourth Avenue South was a soft-drink bar and bootlegging joint.

MR. DORE: We ask an exception to all this testimony.

THE COURT: Yes, note an exception.

That the Silver Dollar is a soft-drink joint at 217½ Second Avenue South.

That 116 Third Avenue South is a soft-drink bar, and bootlegging joint.

That 104½ Fourth Avenue South was a soft-drink bar and bootlegging joint.

215 Second Avenue South at that time was a bootlegging joint and had a bar and soft drink place similar to the Silver Dollar near it.

The South Pole was at the northwest corner of Dearborn and 6th Avenue South, a soft-drink bar and bootlegging joint.

211½ Second Avenue South was a bootlegging joint downstairs similarly fitted up as the Silver Dollar.

105 Washington Street was a bootlegging joint and soft-drink bar.

217½ Washington Street was up to a few days before the raid on the Monte Carlo a bootlegging and soft-drink joint.

104 Washington Street was a sort of a soft-drink and bootlegging joint.

101 Occidental up to a few days before the raid on the Monte Carlo was a bootlegging joint and a soft-drink place in the basement under Joe Dizard's.

On the reverse side of Exhibit 46:

215 Second Avenue South was a bootlegging joint at that time." (R. 60-62)

This testimony was incompetent, irrelevant and immaterial. It was offered for the purpose of showing that these were places from which Frank Gatt was collecting protection money for the sheriff and chief of police. It could have no other purpose in the case and could influence the jury in no other manner. It was introduced solely for this purpose. The defendants were charged with conspiracy. The *situs* of this conspiracy was laid at 404 Fifth Avenue South, and the only testimony relating to any other place was

that on the floor above 404, in Room 17, there was a liquor cache, the liquor being taken from the cache to 404 Fifth Avenue South and there disposed of. Testimony such as this had no relevancy to the issue at all.

On page 81 of the Record appears the following cross examination of the defendant Frank Gatt:

> "Q. You were convicted—you and Cicci were convicted of the possession of intoxicating liquor out of that place in 1923?
>
> Defendants object on the ground that it is incompetent, irrelevant and immaterial. Objection sustained and the jury instructed to disregard it."

The Government sought to prove that Gatt and another indicted with him was convicted in 1923 of the possession of intoxicating liquor at the place laid in this indictment. Objection to this was sustained.

On page 83 of the Record, counsel made the following improper argument:

> "* * * These defendants are charged with conspiracy, they have taken the stand in their own behalf, three of them, and we tried to examine them on certain things connected with that place; we tried to show you that this place was raided and Frank Gatt came and pleaded guilty, and the court would not let us do it—
>
> "* * * We tried to bring out all the other facts so that you might have the whole story; Mr. Dore objected I suppose feeling he was protecting the rights of his clients—"

Despite all that the court could do—and it is our

contention that he did not do sufficient—time and time again the district attorney kept repeating to the jury his attempt to get into the case testimony that the court had excluded, and kept insinuating that if he only had been permitted to get it in, the jury would have learned something to their benefit. The prejudicial conduct of the district attorney is shown again on page 82 of the Record, where he says:

> "When you find a crowd of men like these in your city, some of them not naturalized, according to the testimony, when you find them together,——"

There was no testimony in the record that the defendants were not naturalized. The jury saw them in court. They were all Italians, as their names indicated, and the jury was told that they were not naturalized. And a similar argument made by the same district attorney was held grounds for reversal by this court, in the case of *Fontanello v. United States*, No. 5045, 19 Fed. (2d) 921, decided by this court on June 13, 1927.

And equally improper, though less prejudicial, were the remarks of the assistant United States attorney, as appears on page 82 of the Record, as follows:

> "I will say to this jury if you want to rid this city of one of its most corrupt influences, and you find that the evidence so warrants in this case, you will have done the city one of the best services in years."

This statement, when coupled with the remarks of his chief, show that the argument was so grossly

prejudicial of itself as to require a reversal of this judgment.

We respectfully contend that the judgment should be reversed.

JOHN F. DORE,
F. C. REAGAN,
H. S. FRYE,
*Attorneys for Plaintiffs-in-Error.*